No. 89-7376 (6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PEARLY L. WILSON,
Petitioner,

v.

RICHARD SEITER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF PETITIONER

ELIZABETH ALEXANDER *
DAVID C. FATHI
ALVIN J. BRONSTEIN
MARK J. LOPEZ
NATIONAL PRISON PROJECT
OF THE AMERICAN CIVIL
LIBERTIES UNION FOUNDATION
1875 Connecticut Ave., N.W., #410
Washington, D.C. 20009
(202) 234-4830

GORDON J. BEGGS
ELINOR R. ALGER
ACLU OF OHIO FOUNDATION
1223 West 6th Street
Cleveland, OH 44113
(216) 781-6278

JOHN A. POWELL
STEVEN A. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

Counsel for Petitioner

* Counsel of Record

48 pp

QUESTIONS PRESENTED

1. Whether the court of appeals erred in applying the "malicious and sadistic" intent requirement of *Whitley v. Albers*, 475 U.S. 312 (1986), to Eighth Amendment challenges to continuing conditions of confinement that do not involve the use of force.

2. Whether the court of appeals erred in affirming the trial court's grant of summary judgment in view of the factual conflicts in the record.

LIST OF PARTIES

The petitioner Pearly L. Wilson is a prisoner at the Hocking Correctional Facility (hereinafter "HCF") in Nelsonville, Ohio. Everett Hunt, Jr., a second plaintiff in the lower courts, is no longer confined at the HCF. The respondents are Richard P. Seiter, Director of the Ohio Department of Rehabilitation and Corrections in Columbus, Ohio, and Carl Humphreys,* Superintendent of the HCF.

* The current Superintendent is Carole Shiplevy.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-7376

PEARLY L. WILSON,
Petitioner,

v.

RICHARD SEITER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, entered on January 16, 1990, is reported at 893 F.2d 861 and is reprinted in the Joint Appendix separately filed (hereinafter "App."). The unreported trial court opinion is also reprinted in the Joint Appendix. App. 53-59.

JURISDICTION

Petitioner filed this action on August 28, 1986. The district court had jurisdiction of the case pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343. The district court denied petitioner's motion for reconsideration of its grant

of summary judgment against him on February 24, 1988. Petitioner filed a notice of appeal on March 2, 1988. The opinion and judgment of the United States Court of Appeals for the Sixth Circuit were issued on January 16, 1990. On April 3, 1990, the Honorable Antonin Scalia, Circuit Justice for the Sixth Circuit, granted an application to extend until May 2, 1990 the time for filing a petition for writ of certiorari. The petition was filed on May 2, 1990, and the Court granted the petition and the motion for leave to proceed *in forma pauperis* on October 1, 1990. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343.

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1343 provides in pertinent part:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT OF THE CASE

This action was filed by the petitioner and another prisoner, acting without counsel, in 1986. The amended complaint alleged that prisoners were double-bunked in dormitories at the HCF with less than fifty square feet per person; that noise levels were excessive; that the dormitory was "nearly frigid" in the winter; and that the clothing provided was inadequate to keep prisoners warm. The amended complaint also claimed that temperatures were excessively high in the summer because of a lack of ventilation, resulting in prisoners experiencing heat-related rashes and prisoners with respiratory problems having difficulty breathing. The complaint further stated that the restrooms were dirty, slippery, and malodorous, and that the food services were a serious threat to the well-being of the prisoners because of inadequate sanitation, ventilation, and sewage drainage. In addition, the complaint alleged that the presence of physically and mentally ill prisoners in the dormitories created a dangerous and stressful environment, and that prisoners were not classified as regulations required. The prisoner plaintiffs requested injunctive and declaratory relief, as well as damages. App. 8-9. The petitioner requested the appointment of counsel,[1] but the trial court took no action on the request.

The parties filed cross-motions for summary judgment with supporting affidavits.[2] Although the opinion of the

---

[1] *See* docket entry for August 28, 1986. App. 1.

[2] The petitioner did not cross-appeal the denial of his motion for summary judgment.

court of appeals ultimately turned on a state of mind question not directly related to the actual conditions at HCF, petitioner summarizes the parties' affidavits below in order to demonstrate that the record presents a factual conflict.[3]

---

[3] The petitioner has reorganized the allegations of the affidavits and countering affidavits to clarify the parties' contentions. The unrepresented petitioner submitted seven affidavits from prisoners living in the dormitory. These were countered by several affidavits from staff and a visitor to the HCF.

Ventilation

Petitioner's Allegations

The air in the dormitory is stagnant and foul from toilets, urinals and colostomy bags. It is difficult to sleep at night because of this foul air. In summer, the temperature goes up to 95°, and this heat is aggravated by the lack of ventilation and the fact that fire exits are locked at all times. The fans in the dormitories are inadequate to move the foul air out. As a result of the heat some prisoners "[fall] out" (faint). Prisoners with respiratory problems have trouble breathing; others develop heat rash.

Respondents' Allegations

The dormitories contain two large exhaust fans to increase ventilation and keep down the temperature in summer. The majority of the windows are in working order, and they are opened in summer. No prisoners have been overcome by heat.

Sanitation

Petitioner's Allegations

Urine accumulates around the toilets and urinals and is inadequately cleaned, resulting in offensive odor; floors are filthy because of a lack of proper cleaning supplies. The dormitory is infested with a variety of insects and mice, and extermination is totally inadequate. The dining hall is filthy and the food is prepared by unsupervised, sometimes diseased prisoners. As a result, petitioner fears to eat in the dining hall.

Respondents' Allegations

The restrooms are completely cleaned twice a day, and throughout the day as necessary. The kitchen area and dining room are cleaned after every meal and kept very clean. Prisoner food workers are required to wear hats and plastic gloves. HCF has contracted with

Ultimately, the issue that the court of appeals considered critical to the case was the respondents' state of mind. On this issue, petitioner contended in his affidavit

---

an exterminator which services the facility twice a month. There have been no known cases of food poisoning.

Overcrowding

Petitioner's Allegations

There are 143 beds in the dormitory; all but twenty eight of the beds are double-bunked. Prisoners have less than 50 square feet per person. The beds are spaced so closely that, with the inadequate ventilation, prisoners smell the body odors of others. The general noise level is high, even during sleeping hours.

Respondents' Allegations

The amount of storage space "appears to be adequate" for most prisoners. There are regulations to control noise. Prisoners have a variety of activities available to them, including television, exercise in the gymnasium or yard, a pool table, a weight room, a prison library, and continuing education classes that involve approximately 100 prisoners.

Lack of Heat

Petitioner's Allegations

The dormitory is "frigid" in winter, causing petitioner physical pain. There are cracks in the walls that can be seen through. Most of the windows cannot be closed completely, so that some bunks get wet during the rain. The clothing is ragged and inadequate to keep prisoners warm in winter; no underwear is distributed.

Respondents' Allegations

The dormitories are adequately heated. Prisoners are not given special winter clothes unless they have jobs that require them to work outside, but they are permitted to buy clothing such as winter underwear. Prisoners are given an extra blanket in winter.

Safety and Protection from Communicable Disease

Petitioner's Allegations

Psychotic prisoners are placed in the dormitories. This causes stress to other prisoners, who cannot predict the behavior of the mentally ill prisoners. Following surgery, prisoners with open sores are housed in the dormitory because of a lack of space in

that he had forwarded a three-page letter complaining of the conditions of confinement to the two respondents on July 6, 1986.[4] Respondent Seiter, petitioner alleged, never responded to that letter. Respondent Humphreys responded but, according to petitioner, failed to take any corrective action other than to forward a copy of the letter to the HCF Unit Manager and his staff. Petitioner alleged that the Unit Manager and his staff did not take any action to remedy the conditions and that, in fact, they had no power to do so.

Respondents' alleged attempts to remedy conditions included regulations to control noise, the employment of an exterminator, the installation of two fans, and provisions for cleaning the dormitory and food service areas.[5]

The district court denied petitioner's motion for summary judgment, citing "a conflict of fact about the conditions of confinement at the Hocking Correctional Facility." However, the trial court subsequently granted the respondents' motion for summary judgment on the ground that the prisoners' affidavits did not demonstrate "obduracy and wantonness" on the part of the prison officials. In granting summary judgment on the claims of poor

---

the prison infirmary. One named prisoner housed in the dormitory was repeatedly hospitalized for pneumonia.

Respondents' Allegations

Prisoners with mental problems are sent from HCF to other facilities. Some prisoners have age-related physical health problems. There is an initial medical screening that includes checking prisoners for infectious diseases such as tuberculosis and hepatitis. Based on the health screening there are no prisoners at HCF with active contagious diseases. There has been no outbreak of contagious disease at HCF since it was converted to a prison in 1983. The number of illnesses such as colds is normal in view of the relatively advanced age of the population.

[4] The affidavit was submitted as part of petitioner's motion for summary judgment, which was filed on November 10, 1986.

[5] *See* respondents' allegations in n.3, *supra*.

sanitation, lack of ventilation, and housing the petitioner with prisoners with communicable diseases, the trial court relied on the factual allegations in the affidavits of the respondents. App. 57-58.

Petitioner appealed to the court of appeals.[6] That court held that petitioner's affidavits were more than colorable, and noted that several circuits had found Eighth Amendment violations arising from conditions similar to those alleged by the petitioner. App. 66. Accordingly, the court held that to the extent that the district judge had adopted the factual allegations in the respondents' affidavits to find that conditions at the HCF did not violate the Eighth Amendment, the district court committed error. App. 66.

The court of appeals also concluded that "some, but not all, of the complained-of conditions suggest the type of seriously inadequate and indecent surroundings necessary to establish an eighth amendment violation." App. 68. (internal quotation marks and citations omitted). However, the court of appeals held that the allegations of mixing mentally ill prisoners with others in the dormitory, excessive heat, and overcrowding did not rise to a constitutional level. With respect to the other claims, the court of appeals held that the respondents' state of mind was the critical issue, as evidenced by respondents' allegations suggesting an attempt to improve conditions. As to these latter allegations, the court stated that:

> At least in this circuit, the *Whitley* [*v. Albers*, 475 U.S. 312 (1986)] standard is not confined to the facts of that case; that is, to suits alleging use of excessive force in an effort to restore prison order.

App. 71.

---

[6] Petitioner continued to proceed *pro se* until the court of appeals appointed counsel. The counsel named in the published opinion withdrew prior to briefing and argument because of the discovery of a conflict of interest. The subsequently-appointed counsel withdrew after the decision of the court of appeals.

Although the court of appeals noted that state of mind is typically not a proper issue for resolution on summary judgment, it held that petitioner's affidavits raised no genuine issue as to the respondents' state of mind. Because the petitioner did not directly dispute the respondents' claims of affirmative efforts to improve conditions, the respondents could not be acting with "obduracy and wantonness . . . marked by persistent malicious cruelty." App. 73. Accordingly, the court of appeals affirmed the trial court's grant of summary judgment.

The judgment of the court of appeals was entered on January 16, 1990. On April 3, 1990, the Honorable Antonin Scalia granted petitioner's application for an extension of time to file a petition for writ of certiorari to May 2, 1990. The petition was filed on that date. This Court granted the petition and the motion for leave to proceed *in forma pauperis* on October 1, 1990.

SUMMARY OF THE ARGUMENT

In *Whitley v. Albers*, 475 U.S. 312 (1986), this Court, in a damages action arising from the shooting of a prisoner, held that staff did not violate the Eighth Amendment in attempting to suppress a prison riot unless their actions were malicious and sadistic. But the *Whitley* Court also reaffirmed the holding in *Estelle v. Gamble*, 429 U.S. 97 (1976), that prison officials' "deliberate indifference" to prisoners' serious medical needs violates the Eighth Amendment. Thus, while under *Whitley* all Eighth Amendment violations must be characterized by "obduracy and wantonness," this state of mind encompasses both the "deliberate indifference" and the "malicious and sadistic" intent standards. The Court indicated that the less demanding standard applies to Eighth Amendment challenges to prison medical care "because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities." *Whitley*, 475 U.S. at 320.

Unlike every other court of appeals that has considered the issue, the court below applied the *Whitley* "prison disturbance" standard to a conditions case, requiring malicious and sadistic intent, rather than the deliberate indifference standard from *Estelle*. This was error because the state's responsibility to provide minimally safe and healthy living conditions does not clash with security considerations. Moreover, because continuing conditions of confinement, unlike the use of force, do not require split-second decisions or involve the special expertise of prison officials, the rationales underlying the "malicious and sadistic" standard of *Whitley* do not apply.

In addition, the lower court's use of the "malicious and sadistic" standard from *Whitley* is inconsistent with this Court's holding in *Rhodes v. Chapman*, 452 U.S. 337 (1981), that courts must apply objective criteria in determining whether conditions of confinement violate the Eighth Amendment. These objective criteria include whether prisoners have been deprived of the basic necessities of life, such as adequate food, clothing, medical care and shelter.

Rhodes' emphasis on objective factors and *Whitley*'s references to state of mind can be harmonized in one of two ways. On the one hand, it is possible to read *Whitley*'s reference to "obduracy and wantonness" as inapplicable to injunctive challenges to continuing prison conditions, in which case *Rhodes* alone would govern and the focus would be exclusively on the conditions themselves without any inquiry into defendants' state of mind. Alternatively, one can conclude that the consequences of violating the Eighth Amendment standard established in *Rhodes* by depriving prisoners of the basic necessities of life are obvious and foreseeable. Thus, such continuing conditions necessarily involve deliberate indifference, so that a separate inquiry into state of mind is redundant. By contrast, a requirement of "malicious and sadistic" intent is clearly inconsistent with the emphasis

Rhodes placed on an objective examination of prison conditions. Petitioner believes that the former interpretation is both more coherent and easier to apply. But, in either event, the decision of the court of appeals cannot stand.

The lower court also erred in affirming summary judgment because it ignored petitioner's claim that he had notified the respondents of the conditions and they had taken no effective action to correct them. A fair reading of petitioner's *pro se* affidavits is that he either challenged the existence of respondents' claimed remedial efforts or averred that the efforts were ineffective to remedy the challenged conditions. Under these circumstances, the question of respondents' state of mind cannot be separated from the factual merits of the parties' allegations about the underlying claims, and summary judgment was inappropriate.

To allow the respondents' claims of remedial efforts to defeat an Eighth Amendment challenge when the record is in dispute as to whether the claimed remedial actions were effective makes no sense. While remedial actions may well be relevant to mootness or remedy concerns, ineffective remedial steps do not preclude the existence of an Eighth Amendment violation.

Finally, the lower court also erred because, in dismissing the petitioner's claims regarding overcrowding, excessive heat, and the mixing of mentally ill prisoners with others in the dormitory, it failed to consider the interaction of these conditions with the others alleged by petitioner. In determining whether the Eighth Amendment has been violated, a court must examine conditions "taken as a whole." *Hutto v. Finney*, 437 U.S. 678, 687 (1978).

Accordingly, petitioner urges this Court to reverse the judgment of the court of appeals affirming summary judgment in favor of respondents, and remand this case to the district court for trial.

ARGUMENT

I. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DECISION IN *WHITLEY v. ALBERS*

Whitley v. Albers, 475 U.S. 312 (1986), involved an action for damages pursuant to 42 U.S.C. § 1983. In that case, a state prisoner alleged that his Eighth Amendment right to be free from cruel and unusual punishments was violated when he was shot by a guard in the course of suppressing a prison uprising. In holding that defendant prison officials were entitled to a directed verdict, this Court stated the following:

> It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.[7]

Whitley, 475 U.S. at 319. However, the Court further indicated that this "obduracy and wantonness" standard is not rigid and monolithic, but must be applied "with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." *Whitley*, 475 U.S. at 320. Thus, when a prisoner claims that his medical needs have been ignored, "obduracy and wantonness" are demonstrated if prison officials acted with "deliberate indifference." *Id., quoting Estelle v. Gamble*, 429 U.S. 97, 105 (1976). By contrast, "[w]here a prison security measure is undertaken to resolve a dis-

---

[7] As explained in Section II, *infra*, the reference to "conduct" may limit *Whitley* to cases in which specific acts by individuals are challenged under the Eighth Amendment. Petitioner argues in Section II that state of mind has never been considered relevant in Eighth Amendment challenges to legislatively enacted penalties, and is similarly irrelevant when prison officials acquiesce in continuing conditions that deprive prisoners of the minimal civilized measure of life's necessities.

turbance," as in *Whitley*, "obduracy and wantonness" are shown only if prison officials used force "maliciously and sadistically for the very purpose of causing harm." *Id.* at 320-321 (internal quotation marks omitted).

The "deliberate indifference" standard is appropriate in medical care cases "because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities." *Whitley*, 475 U.S. at 320.

> [D]eliberate indifference to a prisoner's serious illness or injury can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates. But, in making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance, prison officials undoubtedly must take into account the very real threats the unrest presents to inmates and prison officials alike, in addition to the possible harms to inmates against whom force might be used. . . . In this setting, a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.

Id. (internal quotation marks and citation omitted).

Like the obligation to provide medical care, the state's responsibility to provide minimally safe and healthy living conditions for prisoners does not clash with security considerations. The rationales underlying the "malicious and sadistic" standard in the context of a damages action arising from a prison riot do not exist when continuing conditions like unsanitary food or vermin infestation are at issue. First, the interest in avoiding the second-guessing of prison officials is greatest when they are making split-second, life-and-death decisions during an emergency. This is not the case with conditions that develop

or persist over time, allowing officials ample opportunity for reflection. Second, prison officials are experts in prison security; deference to them is properly at its zenith when they make security judgments regarding the use of force.[8] Decisions about medical care, nutrition, and environmental health involve no special penological competence and deference is less appropriate.[9]

For these reasons, the *Whitley* Court carefully confined the "malicious and sadistic" standard to the limited circumstances of major prison disorders. This standard applies "[w]here a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that indisputably poses significant risks to the safety of inmates and prison staff." *Whitley*, 475 U.S. at 320.[10]

---

[8] "When the ever-present potential for violent confrontation and conflagration ripens into *actual* unrest and conflict, the admonition that a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators carries special weight." *Whitley*, 475 U.S. at 321 (emphasis in original, citations and internal quotation marks omitted).

[9] This Court and lower courts have been especially deferential to prison policies related to the preservation of discipline and institutional security. However, many conditions of confinement, such as overcrowding, poor sanitation, and inadequate safety precautions, are the result of neglect rather than deliberate policy decisions. There is no reason of comity, judicial restraint, or recognition of expertise for courts to defer to prison officials when conditions result from a dearth of resources or a lack of motivation to operate decent prisons. *See Rhodes v. Chapman*, 452 U.S. 337, 362 (1981) (Brennan, J., concurring).

[10] *Whitley* involved a "prison riot" in which one officer had been assaulted, another had been taken hostage, and prisoners were armed and had barricaded a cellblock. Officials had been informed (incorrectly) that a prisoner had been killed and that other deaths would follow. 475 U.S. at 314-15, 322-23.

There is a dispute about the extent of *Whitley's* applicability, but it does not reach this case. The Second Circuit applied the "deliberate indifference" standard to a prisoner's claim that prison

The four dissenting members of the Court similarly understood the "malicious and sadistic" standard to apply only in these extraordinary situations. *See Whitley*, 475 U.S. at 328 (Marshall, J., dissenting) (criticizing "the especially onerous standard the Court has devised for determining whether a prisoner injured during a prison disturbance has been subjected to cruel and unusual punishment"). Certainly, in view of the majority's careful distinction, rather than overruling, of *Estelle v. Gamble*, there is no room for argument that the "malicious and sadistic" standard now governs all Eighth Amendment prison cases.

Thus, the court below applied *Whitley* incorrectly.[11] That court failed to recognize that the "obdurate and

---

personnel failed to protect him from assault by other inmates. *Stubbs v. Dudley*, 849 F.2d 83, 86 (2d Cir. 1988), *cert. denied*, 109 S.Ct. 1095 (1989). Three Justices dissented from the denial of certiorari, questioning the view that *Whitley* is limited to "full-blown prison riots" and suggesting that the *Whitley* "malicious and sadistic" standard should apply because "[t]he situation here was arguably *more* dangerous than in *Whitley*. . . . Here a split second decision had to be made. A single door stood between armed prisoners, who had engaged in a sit-in earlier in the day, and the prison arsenal and the office of the prison superintendent." *Dudley v. Stubbs*, 109 S.Ct. 1095, 1097 (1989) (O'Connor, J., dissenting) (mem.) (emphasis in original, internal quotation marks omitted).

The *Dudley* dissent provides no support for the view that the *Whitley* "malicious and sadistic" test applies to continuing conditions of confinement like those at issue here. At most, it stands for the proposition succinctly stated by one court of appeals: "Although *Whitley* was decided in the extremely volatile context of a prison riot, its reasoning may be applied to other prison situations requiring *immediate coercive action*." *Ort v. White*, 813 F.2d 318, 323 (11th Cir. 1987) (emphasis supplied).

[11] The decision below is also inconsistent with *Smith v. Wade*, 461 U.S. 30 (1983), in which the plaintiff was raped by his cellmate and was awarded compensatory and punitive damages by a jury. Prison staff argued that the proper standard for punitive damages was "actual malicious intent." This Court upheld instructions embodying a standard of reckless or callous disregard of, or indif-

wanton" standard in *Whitley* encompasses both the "deliberate indifference" and the "malicious and sadistic" intent standards. Which of these two tests applies depends on the nature of the Eighth Amendment violation alleged. Although this case does not involve a prison disturbance, the court of appeals held that "the *Whitley* standard of obduracy and wantonness requires behavior marked by persistent malicious cruelty." App. 73. Thus, the court of appeals applied the incorrect prong of the *Whitley* test. Had it applied the "deliberate indifference" standard, it could not have affirmed the district court's entry of summary judgment for respondents.[12]

Following the distinction drawn by this Court in *Whitley*, the Fourth,[13] Fifth,[14] Eighth,[15] Tenth,[16] and District

---

ference to, the prisoner's rights, and rejected any requirement that the plaintiff show actual malicious intent.

The standard for constitutional liability was not before the Court. *Id.* at 51. However, in view of the Court's holding that punitive damages required only recklessness or callous indifference, *a fortiori*, the Court could not have approved an actual malice standard for initial liability.

[12] Petitioner's affidavits allege facts which, if true, would establish deliberate indifference on the part of respondents. *See* n.3, *supra*, and section III, *infra*.

[13] *See LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987), discussed in text *infra*.

[14] In *Foulds v. Corley*, 833 F.2d 52 (5th Cir. 1987), the court of appeals reviewed the trial court's dismissal of a prisoner's complaint as frivolous. The prisoner raised due process and Eighth Amendment claims. The latter involved allegations that the solitary confinement cell was very cold and infested with rats and that the prisoner had to sleep on the floor. The Fifth Circuit held that if the prisoner proved his Eighth Amendment allegations, he would be entitled to relief. In the course of doing so, the court explicitly rejected an analysis identical to that employed by the court of appeals in this case:

> The district court relied on *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986), to require a showing that the deputies acted with malicious and sadistic intent in

> subjecting Foulds to the above-described conditions. This reliance was in error. *Whitley* involved the shooting of an inmate during a prison riot. In that setting, involving essential prison security, the Supreme Court required a showing of "malicious and sadistic intent" by prison officials to support a claim under the eighth amendment. *Whitley*, 475 U.S. at 320, 106 S.Ct. at 1085, 89 L.Ed.2d at 261. The facts of the instant case markedly differ. There was no imminent danger. We decline the invitation to extend the rule of *Whitley* to cover all prison disciplinary actions, ostensibly under the guise of achieving prison security. We do not see *Whitley* as the harbinger of such, *see* 475 U.S. at 319, 106 S.Ct. at 1084, 89 L.Ed.2d at 260 (recognizing the general "unnecessary and wanton" standard of review).

Id. at 54.

A different panel of the Fifth Circuit reached precisely the same conclusion in reversing the dismissal of a prisoner complaint alleging that prisoners contracted tuberculosis as a result of confinement in a dirty, overcrowded cellblock that had inadequate ventilation and lighting as well as insect infestation. In the course of reversing the trial court, the Fifth Circuit made clear that the *Whitley* "malicious and sadistic" intent requirements do not apply to continuing conditions of confinement:

> But unlike "conduct that does not purport to be punishment at all" as was involved in *Gamble* and *Whitley*, the Court has not made intent an element of a cause of action alleging unconstitutional conditions of confinement. Prison conditions may violate the eighth amendment even if they are not imposed maliciously or with the conscious desire to inflict gratuitous pain.

Gillespie v. Crawford, 833 F.2d 47, 50 (5th Cir. 1987). Although the Fifth Circuit *en banc* vacated other portions of the panel's opinion on unrelated procedural grounds, this portion of the decision was reinstated. *Gillespie v. Crawford*, 858 F.2d 1101, 1103 (5th Cir. 1988) (en banc).

[15] In *Wright v. Jones*, 907 F.2d 848 (8th Cir. 1990), the court of appeals considered a prisoner's claim of a failure to protect him arising from a beating by other inmates. The court of appeals rejected the application of a "malicious and sadistic" intent standard, holding that the proper standard for staff liability was "deliberate indifference."

> It is not appropriate to apply the *Whitley* standard in this case, because the guards have not identified a competing obligation which inhibited their efforts to protect inmates. Thus,

> the guards can be held liable under the deliberate indifference, or reckless disregard, test because liability can be established without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates.

Id. at 851. (citations omitted and internal quotation marks removed).

In *Howard v. Adkison*, 887 F.2d 134, 138 (8th Cir. 1989), a decision not discussing *Whitley*, the Eighth Circuit applied the deliberate indifference standard to affirm a jury verdict against correctional officials based on a failure to maintain sanitation in the plaintiff's cell. The officials claimed that there was no evidence that they actually knew about the plaintiff's conditions of confinement. The Eighth Circuit held that actual knowledge was not required. Rather, the standard was more than negligence but less than malicious or actual intent. The Eighth Circuit held that the pattern of events over a period of two years in a unit supervised by the correctional officials allowed the jury to find tacit authorization or reckless disregard. The court thus upheld the jury instruction, which employed the deliberate indifference standard.

[16] *Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990), involved a damages suit under 42 U.S.C. § 1983 brought by the widow of a prisoner who had been murdered by other prisoners, allegedly as a result of the wrongful conduct of his jailers. In the course of determining the proper Eighth Amendment test to apply, the Tenth Circuit observed:

> [The *Whitley*] standard . . . does not apply to every Eighth Amendment claim. Even while defining its new "malicious[] and sadistic[]" standard, the Court carefully preserved the applicability of its "deliberate indifference" standard, articulated in *Estelle v. Gamble* . . .
>
> After careful consideration, we hold that *Whitley's* "malicious and sadistic" standard does not apply to the facts of this case; rather, the applicable standard is the traditional "deliberate indifference" inquiry of *Estelle*. Unlike *Whitley*, here there is no danger that the deliberate indifference standard will fail to "adequately capture the importance of . . . competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Whitley*, 475 U.S. at 327, 106 S.Ct. at 1088.

Berry, 900 F.2d at 1494-1495. The *Berry* court emphasized "the distinction so carefully preserved in *Whitley* between the malicious and sadistic standard applicable in prison riot situations and the

of Columbia[17] Circuits, have explicitly rejected the application of the "malicious and sadistic" test to cases challenging continuing conditions of confinement not involving the use of force.

In *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987), former Justice Powell, sitting by designation, found that the denial of basic necessities of personal hygiene to a handicapped prisoner violated the Eighth Amendment. The defendant prison officials had been aware of the special hygiene needs of the prisoner and had made some belated, ineffectual attempts to respond to them. *Id.* at 392-393. The court held that the case could be characterized as either a conditions of confinement or a medical care case. In either event, the court held, in such circum-

deliberate indifference standard applicable to more ordinary prison policy decisions." *Id.* at 1495. *See also id.* at 1496 n.8 (noting "the Supreme Court's careful distinction in *Whitley* between riot and more ordinary circumstances").

[17] In *Morgan v. District of Columbia*, 824 F.2d 1049 (D.C. Cir. 1987), the court upheld a jury verdict finding that correctional officials acted with deliberate indifference in failing to protect the plaintiff from assault by a fellow prisoner. In the course of that affirmance, the court of appeals analyzed *Whitley* and held that the jury instruction based on deliberate indifference was sufficient:

> The exigencies and competing obligations facing prison authorities while attempting to regain control of a riotous cellblock, which led the Court to conclude that the "deliberate indifference" standard was inadequate in *Whitley*, are not present in this case. The gravamen of Morgan's claim is the District's overcrowding of the Jail; the conduct Morgan challenges is the municipality's operation of the Jail generally. In this context, unlike in the prison riot setting, there can be no legitimate concern that liability will improperly be based on "decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Whitley*, 106 S.Ct. at 1085. The District's practice of prison overcrowding has endured at least since 1971. We therefore conclude that "deliberate indifference" was the appropriate standard by which to judge the District's conduct in this case.

Id. at 1057-1058.

stances *Whitley* required no more than a "deliberate indifference" standard, and the prison officials' conduct demonstrated the requisite deliberate indifference:

> Although in *Whitley v. Albers* the Court held that the "deliberate indifference" standard does not adequately capture the importance of the competing obligations that exist in making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance, *id.* 106 S.Ct. at 1085, the instant case does not involve such concerns. Whether one characterizes the treatment received by LaFaut as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the "deliberate indifference" standard articulated in *Estelle* to this case. In the context of this case there is no clash between LaFaut's treatment and "equally important governmental responsibilities." *Cf. Whitley v. Albers*, 475 U.S. at 320, 106 S.Ct. at 1084.[4]

[4] To the extent the district court's memorandum and order can be construed as requiring appellant to demonstrate that Hambrick "acted intentionally to deprive LaFaut of medical care," (App. at 102-03) this is erroneous. Appellant need only show that Hambrick was deliberately indifferent to his needs, not that she affirmatively intended to deprive him of the means of satisfying his needs.

834 F.2d at 391-392.

The First,[18] Ninth,[19] and Eleventh[20] Circuits have also applied the "deliberate indifference" standard, rather than

[18] In *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556 (1st Cir. 1988), *cert. denied*, 109 S.Ct. 68 (1988), the court of appeals affirmed a jury verdict finding that prison officials had acted with deliberate indifference in failing to protect prisoners' lives in a prison characterized by "severe overcrowding (a system-wide average of twenty square feet per prisoner), squalor, maltreatment, gang warfare, killings, lack of proper medical care, failure to segregate mentally disturbed prisoners, guards unable to control entire cellblocks, and other horrors." *Id.* at 558.

[19] In *Noll v. Carlson*, 809 F.2d 1446, 1449 n.4 (9th Cir. 1987), the court of appeals, citing *Whitley*, reversed the dismissal of a

the "malicious and sadistic" test, to prisoner challenges to conditions of confinement.

It is noteworthy that even the respondents decline to defend the decision of the court of appeals on its own terms. In their opposition to the petition for certiorari, the respondents made no argument that the heightened "malicious and sadistic" intent requirement applies to continuing conditions of confinement. Rather, respondents asserted that the court of appeals did not apply such a requirement. Opposition to Petition for Writ of Certiorari, p.12. That contention is clearly belied by a fair reading of the court's decision. *See* pp. 7-8, *supra*. In short, the court below is alone in its misapplication of *Whitley*, and its decision constitutes clear error.

II. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S EMPHASIS ON OBJECTIVE CRITERIA FOR DETERMINING WHETHER THE EIGHTH AMENDMENT HAS BEEN VIOLATED

A. Under *Rhodes*, Continuing Conditions of Confinement Are to be Judged by Objective Criteria

In the leading case explicating the standard for judging whether prison conditions violate the Eighth Amendment, this Court did not focus on state of mind, but emphasized

---

pro se complaint because the prisoner might be able to establish that the alleged failure to protect him constituted deliberate indifference.

[20] In *Powell v. Lennon*, 914 F.2d 1459 (11th Cir. 1990), a prisoner alleged that his Eighth Amendment rights were violated when he was housed in a dormitory contaminated with asbestos. Characterizing the requirement to be housed in an area not contaminated with asbestos as a serious medical need, the court of appeals applied the "deliberate indifference" standard to the plaintiff's Eighth Amendment claim, and reversed the district court's order of dismissal. *See also Evans v. Dugger*, 908 F.2d 801, 804 (11th Cir. 1990) ("deliberate indifference" test applies to disabled prisoner's claim that he was denied special facilities he needed because of his handicap).

that this inquiry "should be informed by objective factors to the maximum possible extent." *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981), *quoting Rummel v. Estelle*, 445 U.S. 263, 274-275 (1980), and *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

Consistent with this emphasis on objective criteria, the Court in *Rhodes* examined the impact of conditions upon prisoners, not the intent with which the conditions were imposed, in determining whether the conditions constituted cruel and unusual punishment.

> These principles apply when the conditions of confinement compose the punishment at issue. Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment. In *Estelle v. Gamble*, [429 U.S. 97 (1976)], we held that the denial of medical care is cruel and unusual because, in the worst case, it can result in physical torture, and, even in less serious cases, it can result in pain without any penological purpose. 429 U.S., at 103, 97 S.Ct., at 290. In *Hutto v. Finney*, [437 U.S. 678 (1978)], the conditions of confinement in two Arkansas prisons constituted cruel and unusual punishment because they resulted in unquestioned and serious deprivation of basic human needs. Conditions other than those in *Gamble* and *Hutto*, alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities. Such conditions could be cruel and unusual under the contemporary standard of decency that we recognized in *Gamble*, *supra*, at 103-104, 97 S.Ct., at 290-291.

Rhodes, 452 U.S. at 347.

The references to "unquestioned and serious deprivation of basic human needs" and to the "minimal civilized measure of life's necessities" support the contention that the constitutionality of prison conditions is measured by

an objective standard. In addition, the Court's citation to *Estelle*, and its specific affirmation that conditions less extreme than physical torture can violate the Eighth Amendment, are inconsistent with the court of appeals' focus on the state of mind of prison officials rather than the objective impact of the challenged conditions upon prisoners.

In *Rhodes*, this Court cited specific cases of lower federal courts finding that prison conditions violated the Eighth Amendment:

> Courts certainly have a responsibility to scrutinize claims of cruel and unusual confinement, and conditions in a number of prisons, especially older ones, have justly been described as "deplorable" and "sordid." When conditions of confinement amount to cruel and unusual punishment, "federal courts will discharge their duty to protect constitutional rights."

Id. at 352 (citations and footnote omitted).

In the footnote accompanying this paragraph of the *Rhodes* opinion, the Court cited four prison conditions cases: *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974); and *Pugh v. Locke*, 406 F.Supp. 318 (M.D.Ala. 1976), *aff'd as modified*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds*, 438 U.S. 781 (1978) (*per curiam*). In all four of the cases cited, the lower courts relied on an analysis of the gravity of the challenged prison conditions, not on the state of mind of prison officials.

Indeed, in *Ramos*, the Colorado legislature, as amicus curiae, argued that the State had made good faith efforts to remedy the constitutional violations. The Tenth Circuit considered such efforts relevant to the scope of the appropriate remedy, but not to whether an Eighth Amendment violation existed. *Ramos*, 639 F.2d at 585-586.

Even more directly on point, in *Gates*, the Fifth Circuit considered the defendants' argument that their good faith efforts after the filing of the lawsuit warranted setting aside the judgment. The *Gates* court rejected that argument:

> The past notoriety of the protracted inhumane conditions and practices at Parchman reveals the necessity for the continuance of the injunctive order of the district court. It is significant that the improvements made at Parchman were not undertaken until after the filing of this suit. Although good faith may be relevant in determining whether defendants have complied with the order of the court, it certainly is not a ground upon which to seek modification of that order.

Gates, 501 F.2d at 1321.[21]

Finally, an important reason for continuing to apply objective criteria to the determination of whether prison conditions violate the Eighth Amendment is the need for uniformity in application of the standard.[22] The determination of a prison official's state of mind necessarily involves a more subjective and difficult fact-finding task for a trial court than an inquiry into whether the conditions of confinement deprive prisoners of the minimal

---

[21] Similarly, in *Williams v. Edwards*, the Fifth Circuit stated, as it had in *Gates*, that "[t]he prohibition against cruel and unusual punishment 'is not limited to specific acts directed at selected individuals, but is equally pertinent to general conditions of confinement that may prevail at a prison.'" *Williams*, 547 F.2d at 1212, quoting *Gates*, 501 F.2d at 1301.

[22] If state of mind were actually critical in injunctive challenges to continuing conditions, then defendants could theoretically forestall a finding of an Eighth Amendment violation simply by appointing a new prison official, without changing the conditions of confinement. *Cf.* F.R.Civ.P. 25(d) (providing that when a public officer is a party to an action in an official capacity and ceases to hold office, the action does not abate but the officer's successor is automatically substituted as a party).

civilized measure of life's necessities. Moreover, if the finding of an Eighth Amendment violation is not based on objective criteria, there will be no uniform constitutional standard for the nation. Surely the minimal civilized measure of life's necessities does not vary from jurisdiction to jurisdiction.

B. Legislative Policies Challenged Under the Eighth Amendment Do Not Require an Inquiry into State of Mind

Rhodes illustrates that there is no state of mind requirement that governs all Eighth Amendment claims. This point is also evident in the fact that this Court has consistently evaluated Eighth Amendment challenges to statutory penalties without any inquiry into the legislative state of mind. For example, when this Court upheld the death penalty for persons who were sixteen or seventeen years old at the time of their crime, the Court relied on its determination that the record did not reflect objective evidence of a societal consensus against the death penalty for juveniles; the Court did not consider the legislative state of mind in imposing that penalty. *See Stanford v. Kentucky*, 109 S.Ct. 2969 (1989). Nor have Eighth Amendment challenges to statutory penalties less than death ever turned on legislative state of mind. *See Solem v. Helm*, 463 U.S. 277, 290-291 (1983) (holding that an Eighth Amendment challenge to a life sentence without the possibility of parole must be judged by objective criteria); and *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion) (invalidating punishment of denationalization on Eighth Amendment grounds without considering legislative state of mind).

Indeed, when the Court has specifically considered conditions of confinement imposed as part of the sentence, the Court has looked at the proportionality of the punishment and not at the legislative state of mind in imposing it. *Weems v. United States*, 217 U.S. 349 (1910) (invalidating under the Eighth Amendment a sentence to

"cadena temporal," a form of imprisonment that included hard labor while chained at the ankles and wrists).

C. Continuing Conditions Violating the Eighth Amendment Standard in *Rhodes* Necessarily Involve at Least Deliberate Indifference

Rhodes v. Chapman and the cases involving legislatively-imposed punishments are consistent with this Court's discussion of state of mind in *Whitley*. First, it should be remembered that *Whitley* dealt with a suit for damages challenging the actions of specific individuals during a one-time emergency situation.[23] Indeed, the Court in *Whitley* stated that obduracy and wantonness characterize "the *conduct* prohibited by the Cruel and Unusual Punishments Clause." *Whitley*, 475 U.S. at 319 (emphasis added). *Whitley* does not address conditions of confinement that do not result from specific individual conduct, but rather from legislative enactments, a policy or custom of the governmental authority, or the collective neglect of state or local officials.

In addition, continuing prison conditions that violate the Eighth Amendment under *Rhodes* necessarily involve at least deliberate indifference, and thus satisfy any relevant state of mind requirement under *Whitley*. When prisoners are subjected to continuing conditions that deprive them of the basic necessities of life such as adequate food, clothing, medical care, and shelter, prison officials have violated a duty to the prisoners imposed by the Con-

---

[23] A prison official's state of mind may well be relevant if the issue is liability for damages resulting from the use of force, but not if the issue is whether continuing conditions should be enjoined.

For similar reasons, public officials charged with violations of the Constitution enjoy qualified good faith immunity in damages but not in injunctive actions. *See Wood v. Strickland*, 420 U.S. 308, 314 n.6 (1975). Here, the petitioner sought injunctive relief as well as damages, and it was particularly inappropriate to apply the "malicious and sadistic" intent standard to the claims for injunctive relief.

stitution, a duty that does not exist with regard to the general public. *See DeShaney v. Winnebago County DSS*, 109 S.Ct. 998, 1005-1006 (1989):

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. See *Youngberg v. Romeo*, [457 U.S. 307, 317 (1982)] ("When a person is institutionalized—and wholly dependent on the State[,] . . . a duty to provide certain services and care does exist"). The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. See *Estelle v. Gamble*, [429 U.S. 97, 103-104 (1976)]; *Youngberg v. Romeo*, *supra*, 457 U.S., at 315-316, 102 S.Ct., at 2457-2458. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. See *Estelle v. Gamble*, 429 U.S., at 103, 97 S.Ct., at 290 ("An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met").

Accord, *West v. Atkins*, 108 S.Ct. 2250, 2258 (1988).

The consequences of the failure to perform this affirmative duty are obvious and foreseeable, so that the existence of continuing conditions of confinement that deprive prisoners of the minimal civilized measure of life's necessities is by definition wanton and obdurate. Conscious indifference to this affirmative duty is the textbook example of wanton behavior. *See Howard v. Adkison*, n.15, *supra*.

In *Smith v. Wade*, 461 U.S. 30 (1983), the Court considered the tort definition of the word "wanton" in the course of considering whether punitive damages could be awarded under § 1983. In that context, the Court quoted the definition of "wanton" from 30 *American and English Encyclopedia of Law* 2-4 (2d. ed. 1905):

> Wanton . . . has also been defined as the conscious failure by one charged with a duty to exercise due care and diligence to prevent an injury after the discovery of the peril, or under circumstances where he is charged with a knowledge of such peril, and being conscious of the inevitable or probable results of such failure.

461 U.S. at 39 n.8.

Even without reference to the prison officials' affirmative duty toward prisoners, such conditions of confinement constitute deliberate indifference. *Cf. City of Canton, Ohio v. Harris*, 109 S.Ct. 1197, 1205 (1989) (footnote omitted):

> But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.[24]

See also City of Canton at 1209 (O'Connor, J., concurring in part and dissenting in part):

> [T]he "deliberate indifference" standard we adopt today [has] required a showing of a pattern of vio-

---

[24] While *City of Canton* dealt with the issue of what constituted a municipal "policy or custom," not the substantive standard for constitutional liability, the discussion of the deliberate indifference standard seems equally applicable to the meaning of deliberate indifference under the Eighth Amendment.

> lations from which a kind of "tacit authorization" by city policymakers can be inferred.

(Citations omitted).[25]

In light of the affirmative duty that prison officials owe to prisoners, if prison conditions constitute such disproportionate punishment as to violate the Eighth Amendment, or deprive prisoners of the minimal civilized measure of life's necessities, any state of mind requirement under the Eighth Amendment is necessarily satisfied. Accordingly, when a court analyzes an injunctive challenge to continuing prison conditions, a separate inquiry into state of mind is redundant.

The lower federal courts have routinely applied this Court's decision in *Estelle v. Gamble*, 429 U.S. 97 (1976), that deliberate indifference to the serious medical needs of prisoners violates the Eighth Amendment, in a manner consistent with this analysis. When a case focuses on continuing conditions of medical care, rather than on the factual circumstances of an individual instance of alleged failure to treat, the federal courts have held that a pattern of failures to make adequate provision for medical care, including obvious failures to provide adequate staffing or equipment, demonstrates deliberate indifference justifying injunctive relief. *See, e.g., Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981):

> In class actions challenging the entire system of health care, deliberate indifference to inmates' health needs may be shown by proving repeated examples of negligent acts which disclose a pattern of conduct by prison medical staff, or by proving there are such

[25] *Graham v. Connor*, 109 S.Ct. 1865, 1873 (1989), indicates that the language of the Eighth Amendment suggests an inquiry into subjective state of mind. For the reasons given in *Whitley*, however, that state of mind, even in damages actions, in appropriate circumstances requires no more than deliberate indifference when continuing conditions of confinement are involved.

> systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care.

(Citations omitted). *See also Rogers v. Evans*, 792 F.2d 1052, 1058-59 (11th Cir. 1986); *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983); *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982); *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979); and *Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977).

As explained in the amicus curiae brief of the American Public Health Association, when prisoners are subjected to continuing conditions that deprive them of the basic necessities of life such as adequate food, clothing, and shelter, such practices generally do not result from a malicious intent to inflict pain. Rather, such conditions typically result from unreasonable neglect and failure to remedy obvious conditions, the textbook examples of deliberate indifference. Imposing a requirement that prison officials' state of mind be malicious and sadistic would be fundamentally inconsistent with this Court's emphasis on objective and consistent application of Eighth Amendment standards, and would gravely compromise the implementation of prison officials' duty to assure the minimum necessities of life to prisoners.

D. Conclusion

If state of mind is relevant at all to prison condition cases under *Rhodes*, plaintiffs should not be required to prove anything more than the "deliberate indifference" of prison officials. First, the "deliberate indifference" standard is consistent with the constitutional and policy analysis of *Whitley*. Second, the standard is consistent with the emphasis on objective criteria articulated in *Rhodes*. Third, it fairly reconciles the decisions in *Whitley* and *Rhodes* because prison conditions that violate the Eighth Amendment standard of *Rhodes* necessarily in-

volve at least "deliberate indifference," and thus satisfy any state of mind requirement imposed by *Whitley*. Thus, a court considering an injunctive challenge to prison conditions need not separately analyze the defendants' state of mind.

III. THE GRANT OF SUMMARY JUDGMENT WAS ERROR

A. Under a Correct Legal Standard, Factual Disputes Precluded Summary Judgment

As noted above, the court of appeals acknowledged in *Wilson* that several circuits had found constitutional violations under the Eighth Amendment based on conditions of confinement similar to those alleged by the petitioner. App. 66. In addition, the court of appeals conceded that at least some of the conditions alleged by petitioner "suggest the type of seriously inadequate and indecent surroundings necessary to establish an eighth amendment violation." App. 68 (internal quotation marks and citation omitted).

Had the court of appeals applied a correct legal analysis, it would have held that factual conflicts in the record prevented resolution of the case on summary judgment. The allegations of the petitioner's affidavits, taken together, put in issue whether petitioner has been deprived of the "minimal civilized measure of life's necessities" with regard to food, sanitation, and shelter under *Rhodes*.

Filth, foul odors, unclean food, vermin infestation, a stifling lack of ventilation coupled with high temperatures in summer and frigid temperatures in winter, bunks wet with rain from malfunctioning windows, and psychotic prisoners and prisoner with open sores mixed into the population [26] are all obviously inhumane conditions. When such conditions occur on a continuing basis, failure to

[26] *See* note 3, *supra*.

remedy them is deliberate indifference in light of the respondents' duties. It is certainly deliberate indifference in light of petitioner's allegation that he specifically informed the respondents of the conditions and that they did nothing to cure the conditions. Accordingly, even if petitioner were required to prove that respondents were deliberately indifferent, summary judgment against petitioner was inappropriate on this record.

Thus, the court of appeals' error stemmed directly from its inappropriate application of the malice standard from *Whitley*:

> Additionally, the *Whitley* standard of obduracy and wantonness requires behavior marked by persistent malicious cruelty. The record before us simply fails to assert facts suggesting such behavior.

App. 73.[27]

[27] It is true that the court of appeals also stated that the record at most suggests negligence on the part of the respondents. For the reasons given above, however, it is apparent that petitioner's allegations of obvious and continuing conditions, coupled with the claim of notice and a lack of response, would, if proven, constitute deliberate indifference and not mere negligence. This is particularly true because the court of appeals conceded that petitioner's affidavits suggested the sort of indecent conditions necessary to violate the Eighth Amendment.

Petitioner thus believes that the record clearly shows a factual conflict with regard to whether respondents acted with deliberate indifference. But even if this Court were not to decide whether deliberate indifference is sufficiently put at issue on this record, the court of appeals' dictum is not controlling. Since the lower court's erroneous choice of the "malicious and sadistic" standard may well have affected its entire view of the facts, this Court may reverse and remand to the court of appeals for consideration of this issue under the proper standard. *Cf. American Foreign Service Ass'n v. Garfinkel*, 109 S.Ct. 1693, 1697 (1989) (returning remaining issue to lower court when lower court had previously analyzed issue "only in abbreviated fashion" so that this Court did not have benefit of lower court's analysis to guide resolution of the merits).

B. The Petitioner's Affidavits Either Challenge the Existence of the Claimed Remedial Efforts or Challenge the Claim that the Remedial Efforts Had Any Significant Impact upon Conditions

The court of appeals affirmed the grant of summary judgment against the petitioner on the ground that the affidavits filed by the petitioner did not raise an issue of material fact as to the defendant prison officials' state of mind, because the petitioner's affidavits did not specifically contradict the respondents' claims of remedial efforts.

The petitioner's own affidavit indicates that on July 8, 1986, he sent a letter to respondents Richard Seiter and Carl Humphreys; that Seiter never replied; and that Humphreys responded only by referring the letter to Mr. Friend, HCF Unit Manager, and his staff. In addition, petitioner alleged:

> Mr. Fr[ie]nd could not, and did not take any action to alleviate or correct the constitutional violations as complained of, nor did any member of his staff. In fact, neither Mr. Fr[ie]nd or his staff has any power to correct the violations.

App. 33. This affidavit was included in petitioner's motion for summary judgment, filed November 10, 1986.

A fair reading of petitioner's affidavits is that he challenged the existence of the claimed remedial efforts, or asserted that they failed to correct the challenged conditions. In the case of ventilation, for example, the petitioner did not deny that fans had been installed. Rather, the claim is that ventilation remains completely inadequate despite the fans. Petitioner claimed that the air in the dormitory is stagnant and foul from toilets, urinals, and colostomy bags, making it difficult to sleep at night. In summer, the temperature goes up to 95°, and the fire exits are locked at all times, and as a result of the

heat some prisoners "[fall] out" (faint). *See* n.3, *supra*.[28]

On the issue of sanitation in food services and the dormitory, the petitioner's claims of filth, food prepared by unsupervised and diseased prisoner workers, offensive odors, and vermin infestation simply contradict the respondents' claims of daily cleaning. If the petitioner's allegations regarding sanitation are true, the respondents' claimed remedial efforts are obviously so ineffectual as to be meaningless.

Clearly, for the trial court to have any useful information about the harm to prisoners, it is critical to know what the facts are. If, for example, the filth alleged by petitioner, in combination with the other conditions, is so extreme as to violate the *Rhodes* standard, the degree of disregard of the affirmative duty toward prisoners is far more serious than if the actual conditions do not deprive prisoners of the minimal civilized measure of life's necessities. The question of whether the conditions involve deliberate indifference or simply negligence cannot be separated from the issue of whether the conditions deprive prisoners of the minimal civilized measure of life's necessities. Accordingly, whether one views the petitioner's affidavits as directly disputing the existence of the respondents' claimed remedial efforts, or as simply disputing the results of those efforts, it is apparent that petitioner has alleged that the unconstitutional conditions have continued unabated despite notification of the respondent prison officials.[29]

---

[28] The respondents denied that any prisoners had been overcome by heat; their affidavits do note that some prisoners with age-related health problems are housed in the dormitory. Respondents did not specifically reply to the allegation that the heat caused prisoners with respiratory problems to have difficulty breathing, or the allegation that, as a result of the conditions, prisoners developed heat rash.

[29] In this case, although the petitioner requested the appointment of counsel in the trial court, the petitioner was required to defend

C. An Eighth Amendment Violation Cannot Be Cured by Ineffectual Remedial Efforts

The position of the court of appeals is that even if continuing conditions of confinement deprive prisoners of the minimal civilized measure of life's necessities,[30] a mere allegation of remedial efforts prevents an inquiry into the objective effect of the conditions on prisoners, since such efforts negate the possibility that prison officials acted with malice.

This position, if adopted by the Court, would effectively insulate prison conditions from Eighth Amendment review. It is also fundamentally inconsistent with basic principles of federal jurisdiction. *See United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952):

> When defendants are shown to have settled into a continuing practice . . . courts will not assume that it has been abandoned without clear proof . . . It is

---

against a motion for summary judgment without the assistance of counsel. Requiring a plaintiff to prove that defendants acted maliciously and sadistically under the emergency use of force standard set forth in *Whitley* is particularly unfair when applied to a prisoner appearing *pro se* who challenges continuing conditions of confinement.

A *pro se* prisoner cannot reasonably be expected to challenge directly the respondents' state of mind. Aside from the fact that petitioner had no reason to expect that he would be required to prove a malicious and sadistic state of mind on the part of respondents, it is unrealistic to expect that, had petitioner known of the requirement, he could have produced any evidence other than the evidence he actually produced: affidavits addressing the actual conditions and evidence that the respondents knew of the conditions and did not act.

[30] *See Wilson*, App. 66:

> Moreover, appellants' affidavits are more than colorable, and obviously place the conditions surrounding confinement in issue. Several circuits have found eighth amendment violations arising from conditions similar to those alleged by the appellants.

(Citations omitted).

> the duty of courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.

See also City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 288-289 (1982) (a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice).

Obviously remedial efforts are relevant to the scope of the appropriate remedy or to possible mootness arguments. But when remedial efforts are ineffectual, this Court should not apply a rule for Eighth Amendment claims different from the federal jurisdictional principles applicable to other constitutional claims. In a case challenging continuing conditions of prison confinement, it is possible that remedial measures by the defendants may be so ineffectual that the resulting conditions still deprive prisoners of the minimal measure of life's necessities. In such a case, just as the prison officials necessarily know of, and give tacit authorization to, the original conditions (*see* Section II.C, *supra*), they necessarily know of, and acquiesce in, the conditions that remain after their claimed remedial efforts. For that reason, acquiescence in conditions that continue, even after remedial efforts, to be unacceptable under the *Rhodes* standard is deliberately indifferent to the prisoners' right to be free from cruel and unusual punishment.

Failure to reverse the decision of the court of appeals would once again place prisoners outside of the protection of the Constitution. *See Wolff v. McDonnell*, 418 U.S. 539, 555-556 (1974):

> But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country.

IV. THE COURT OF APPEALS ERRED IN DISMISSING CERTAIN OF PETITIONER'S CLAIMS

The court of appeals dismissed petitioner's claims regarding overcrowding, excessive heat, and mixing of mentally ill prisoners with others in the dormitory, holding that these allegations did not rise to the level of a constitutional violation. App. 68. This was error, because these claims should have been considered as part of the overall conditions challenged in the dormitory. Conditions of confinement, "alone or in combination," may deprive prisoners of the minimal civilized measure of life's necessities. *Rhodes*, 452 U.S. at 347. *See also id.* at 363 n.10 (Brennan, J., concurring) ("The Court today adopts the totality-of-the-circumstances test") (citations omitted). In *Hutto v. Finney*, 437 U.S. 678 at 688, this Court noted "the interdependence of the conditions producing the [Eighth Amendment] violation." Accordingly, the Court in *Hutto* approved the action of the lower court determining whether the Eighth Amendment had been violated by examining conditions "taken as a whole." *Id.* at 687.

For example, the claim that the dormitory is overcrowded cannot be evaluated without considering the claims of filth, lack of ventilation, and mixing of physically ill prisoners into the general population. Certainly the adequacy of the ventilation is directly related to the degree of crowding in the facility. The reasonableness of using two fans to supply ventilation for a dormitory turns on the number of bodies in the dormitory. Minimally adequate ventilation for 143 prisoners is different from the ventilation necessary for the smaller number of prisoners that could be accommodated were the dormitory not double-bunked.[31] Similarly, the allegations of filth,

[31] For example, American Correctional Association (ACA) Standard 2-4131 requires that multiple housing areas provide air circulation of at least ten cubic feet of outside or recirculated air per minute per occupant. While the petitioner does not argue that the ACA Standard establishes a constitutional requirement, it demonstrates that the adequacy of ventilation cannot be considered apart from the number of occupants required to share the dormitory. *Cf. Rhodes*, 452 U.S. at 348 n.13.

vermin infestation, and build-up of urine around the toilets and urinals may well be related to the greater pressure on the sanitation of the facility resulting from the increase in population. Petitioner also alleged that prisoners recovering from surgery, including prisoners with open sores, were put into the dormitories as a result of a shortage of space in the infirmary. Again, this allegation suggests an interrelation between overcrowding and the other claims of the petitioner.

In addition, the petitioner alleged that respondents were planning further increases in population, and the installation of cubicle divisions in the dormitory, steps that would exacerbate the lack of adequate ventilation. App. 35. These changes, if they occurred, would also be relevant in judging the constitutionality of the resulting conditions.[32]

Similarly, the claims of excessive heat cannot be viewed in isolation from the other claims raised by the petitioner. The degree of potential harm from air that is 95° Fahrenheit depends on the relative humidity of the air, the presence or absence of ventilation, the general health of the persons exposed to this condition, and the duration of exposure. In this case, the petitioner alleged that the air was damp because of nonfunctioning windows.[33] In addi-

[32] While the overcrowding might not be unconstitutional in itself, because the effect of overcrowding cannot be separated from the overall conditions of the unit, the trial court on remand should not arbitrarily exclude evidence of the impact of overcrowding on the overall conditions in the dormitory. *See Tillery v. Owens*, 907 F.2d 418, 427-428 (3d Cir. 1990).

[33] The affidavits in support of petitioner alleged that wet towels and face cloths hung in the dormitory took at least eight to ten hours to dry (App. 18, 20), also suggesting high relative humidity.

tion, the respondents conceded that some prisoners have age-related physical health problems. In view of the fact that petitioner specifically alleged that, as a result of the heat, some prisoners "[fall] out;" that prisoners with respiratory problems have trouble breathing; and that prisoners develop heat rash, it was error to dismiss the claim of excessive heat.

It was also error to dismiss the claim of mixing psychotic and general population prisoners in the dormitory. Petitioner alleged that this lack of classification caused stress because other prisoners could not predict the behavior of the mentally ill prisoners. App. 11. The lower court dismissed this claim on the ground that petitioner had not established that he was in reasonable fear of attack, citing *Shrader v. White*, 761 F.2d 975 (4th Cir. 1985). The court below held that "the absence of allegations of prior physical violence involving any inmate supporting [petitioner's] claims leads us to conclude that [his] fear is not reasonable." App. 69. While that comment might be persuasive if petitioner had simply cited a generalized concern about lack of personal safety, it ignores petitioner's specific claim about the mixing of psychotic prisoners with general population prisoners. A fear of psychotic prisoners is not an unreasonable fear, and the claim should not have been dismissed without an evidentiary inquiry into whether psychotic, dangerous prisoners were actually mixed into the general population as a result of overcrowding, creating an unreasonably dangerous situation.[34]

[34] The consequences of mixing mentally deranged inmates with the mentally healthy are not limited to the danger of physical assault. One court cited the smell of feces and accumulated filth, intense noise from screaming, the setting of fires, and the sight and sound of self-mutiliation and other "seemingly demented activity." *Langley v. Coughlin*, 715 F.Supp. 522, 543-44 (S.D.N.Y. 1989); *accord, DeMallory v. Cullen*, 855 F.2d 442, 444-45 (7th Cir. 1988). Sometimes the mentally ill inmates are endangered by being mixed with the general population. *See, e.g., Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 559-560 (1st Cir. 1988). After full evidentiary presentations, several courts have concluded that the Constitution requires separation of the mentally ill from the general population in prisons and jails. *See Tillery v. Owens*, 719 F.Supp. 1256, 1303 (W.D.Pa. 1989), *aff'd*, 907 F.2d 418 (3d Cir. 1990) (after trial); *Inmates of Occoquan v. Barry*, 717 F.Supp. 854, 868 (D.D.C. 1989) (after trial; inmates with mental health problems barred from administrative/punitive segregation area); *Albro v. County of Onondaga, N.Y.*, 627 F.Supp. 1280, 1286 (N.D. N.Y. 1986) (after hearing on preliminary injunction motion); *Reece v. Gragg*, 650 F.Supp. 1297, 1304-05 (D.Kan. 1986) (summary judgment after a series of hearings and court inspections); *see also Jones v. Diamond*, 594 F.2d 997, 1016 (5th Cir. 1979) (jails should separate pretrial detainees from violent, disturbed, and contagiously ill individuals as much as possible).

The record does not reveal whether the "stress" caused to other prisoners by the mingling of psychotics in dormitories reaches the levels described in cases like *Langley, supra*. But certainly a claim of this nature should not have been dismissed based only on a *pro se* litigant's failure to spell it out in sufficient detail.

Accordingly, the court of appeals erred in examining petitioner's claims in isolation, rather than evaluating the totality of conditions, including possible interactions among the various conditions.

CONCLUSION

For the above reasons, petitioner urges this Court to reverse the decision of the court of appeals affirming the grant of summary judgment to the respondents, and to remand to the district court for trial.

Respectfully submitted,

ELIZABETH ALEXANDER *
DAVID C. FATHI
ALVIN J. BRONSTEIN
MARK J. LOPEZ
NATIONAL PRISON PROJECT
OF THE AMERICAN CIVIL
LIBERTIES UNION FOUNDATION
1875 Connecticut Ave., N.W., #410
Washington, D.C. 20009
(202) 234-4830

GORDON J. BEGGS
ELINOR R. ALGER
ACLU OF OHIO FOUNDATION
1223 West 6th Street
Cleveland, OH 44113
(216) 781-6278

JOHN A. POWELL
STEVEN A. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

Counsel for Petitioner

* Counsel of Record